90-1859

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

THAKORBHAI [illegible] PATEL,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition For Writ Of Certiorari
To The Court Of Appeal
For The State Of California,
Fourth Appellate District, Division Two

PETITION FOR WRIT OF CERTIORARI

DENNIS TILTON, ESQ.
234 N. Arrowhead Avenue
San Bernardino, CA 92408
Telephone: (714) 825-7350

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Where oral utterances are offered by the prosecution as the sole basis for delay or obstruction of a public officer engaged in the discharge of some official duty, can a criminal conviction for delaying or obstructing said officer be grounded upon mere general criminal intent without any showing that the accused harbored a specific intent to obstruct or delay the officer?

TABLE OF CONTENTS

Pages

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ..... ii-iii

TABLE OF AUTHORITIES ..... iv-vi

INTRODUCTION 1

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3-4

STATEMENT OF FACTS 5-11

HOW THE FEDERAL QUESTION IS PRESENTED . 11-12

REASONS FOR GRANTING THE WRIT 12-13

ARGUMENT 13-22

I. WHERE FREE SPEECH IS IN ISSUE, ORAL UTTERANCES ADVANCED BY THE STATE AS A BASIS FOR DELAY OR OBSTRUCTION OF A PUBLIC OFFICER ENGAGED IN THE DISCHARGE OF AN OFFICIAL DUTY MUST BE COUPLED WITH SPECIFIC INTENT TO DELAY OR OBSTRUCT THE OFFICER, IN ORDER TO SUSTAIN A CRIMINAL CONVICTION GROUNDED UPON SPOKEN REMARKS 13-18

TABLE OF CONTENTS – Continued

Page

II. THE TRIAL JUDGE MUST INSTRUCT THE JURY *SUA SPONTE* THAT SPECIFIC INTENT TO DELAY OR OBSTRUCT A PUBLIC OFFICER IS A REQUIRED ELEMENT OF DELAYING OR OBSTRUCTING A PUBLIC OFFICER, WHERE ORAL UTTERANCES ARE PRESENTED AS THE SOLE BASIS FOR SUCH POSSIBLE DELAY OR OBSTRUCTION..... 18-20

III. THE TRIAL COURT'S FAILURE TO PROPERLY INSTRUCT THE JURY ON THE REQUISITE INTENT REQUIRED FOR A CRIMINAL CONVICTION INFECTED JURY DELIBERATIONS TO SUCH AN EXTENT THAT PETITIONER WAS DEPRIVED OF A FAIR TRIAL CONCERNING ALL COUNTS CHARGED AGAINST HIM..... 21-22

CONCLUSION 22

APPENDICES..... App. 1-App. 22

TABLE OF AUTHORITIES

Page

CASES

American Railway Express Co. v. Levee, 263 U.S. 19, 20-21, 68 L.Ed. 140, 143, 44 S.Ct. 11, 12 (1923) 2

Duran v. City of Douglas, Ariz., 904 F.2d 1372, 1378 (9th Cir. 1990) 16

Flower v. United States, 407 U.S. 197, 198-199, 32 L.Ed.2d 653, 656, 92 S.Ct. 1842, 1843 (1972) 16

Houston v. Hill, 482 U.S. 451, 96 L.Ed.2d 398, 107 S.Ct. 2502 (1987) 12, 15, 18

Long v. Valentino, 216 Cal.App.3d 1287, 1295 (1989) 16

People v. Baker, 42 Cal.2d 550, 576, 268 P.2d 705, 721 (1954) 19

People v. Bernhardt, 222 Cal.App.2d 567, 593 (1963) 21

People v. Bevins, 54 Cal.2d 71, 77-78, 351 P.2d 776, 780 (1960) 19

People v. Hamilton, 33 Cal.2d 45, 51, 198 P.2d 873, 877 (1948) 19

People v. Kirkes, 39 Cal.2d 719, 729, 249 P.2d 1, 7 (1952) 21, 22

People v. Perry, 79 Cal.App.2d Supp. 906, 907 (1947) 14

People v. Putnam, 20 Cal.2d 885, 890, 129 P.2d 367, 370-371 (1942) 19

People v. Robinson, 61 Cal.2d 373, 395, 392 P.2d 970, 984 (1964) 20

People v. Rogers, 22 Cal.2d 787, 807, 141 P.2d 722, 732 (1943) 20

TABLE OF AUTHORITIES – Continued

Page

People v. Zerillo, 36 Cal.2d 222, 232-233, 223 P.2d 223, 229-230 (1950) 22

Perry Ed. Assn. v. Perry Local Ed. Assn., 460 U.S. 37, 45, 74 L.Ed.2d 794, 804, 103 S.Ct. 948, 954 (1983) 16

Roth v. United States, 354 U.S. 476, 488, 1 L.Ed.2d 1498, 1509, 77 S.Ct. 1304, 1311 (1957) 17

Stanley v. Georgia, 394 U.S. 557, 563, 22 L.Ed.2d 542, 548-549, 89 S.Ct. 1243, 1247 (1969) 17

Terminiello v. Chicago, 337 U.S. 1, 4, 93 L.Ed. 1131, 1134, 69 S.Ct. 894, 896 (1949) 15

United Steelworkers of America v. Sadlowski, 457 U.S. 102, 111, 72 L.Ed.2d 707, 715, 102 S.Ct. 2339, 2345 (1982), rehg. den. 459 U.S. 899, 74 L.Ed.2d 160, 103 S.Ct. 199 (1982) 15

CONSTITUTIONAL PROVISIONS

California Constitution: Article I, section 2 16

California Constitution: Article I, section 15 20

California Constitution: Article VI, section 4½ 19

California Constitution: Article VI, section 13 ..... 19, 20

United States Constitution: First Amendment 3, 11, 12, 15, 16

United States Constitution: Sixth Amendment 3, 20

United States Constitution: Fourteenth Amendment 3, 11, 12, 15, 16, 20

TABLE OF AUTHORITIES – Continued

Page

STATUTES

California Penal Code section 148 ..... *passim*

California Penal Code section 266h 3

California Penal Code section 266i 3

California Penal Code section 316 3

California Penal Code section 664 3

California Penal Code section 1237(a) 4

Title 28, United States Code, section 1257(3) 2

COURT RULES

Rules of the Supreme Court of the United States:
Rule 13 2

OTHER AUTHORITIES

CALJIC 3.30 ..... 3, 17

CALJIC 3.31 ..... 3, 17

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Petition For Writ Of Certiorari
To The Court Of Appeal
For The State Of California,
Fourth Appellate District, Division Two

PETITION FOR WRIT OF CERTIORARI

Petitioner, THAKORBHAI L. PATEL, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division Two, issued on September 11, 1990, affirming the judgment of the trial court which was pronounced on August 31, 1989. A petition for review was denied in a nonunanimous ruling filed on November 28, 1990. The remittitur was issued on December 3, 1990.

OPINIONS BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division Two, affirming the judgment of the San Bernardino County Superior Court, appears as APPENDIX 1 attached to this petition. A copy of the California Supreme Court's order denying petitioner's petition for review is here attached as APPENDIX 2. The remittitur issued by the California Court of Appeal, Fourth Appellate District, Division Two, is appended hereto as APPENDIX 3.

JURISDICTION

The California Court of Appeal, Fourth Appellate District, Division Two, entered its judgment and opinion below in this case on September 11, 1990. On October 22, 1990 petitioner filed a timely petition for review with the California Supreme Court. On November 28, 1990 the petition for review was denied by a divided California Supreme Court. Title 28, United States Code, section 1257(3) confers jurisdiction on the Court in this case.

Where the highest state court has jurisdiction to review a decision of a lower state court, but refuses to do so, the time for petitioning for a writ of certiorari runs from the date of the higher court's refusal to review. (*American Railway Express Co. v. Levee*, 263 U.S. 19, 20-21, 68 L.Ed. 140, 143, 44 S.Ct. 11, 12 (1923). Since this petition is being filed within 90 days of the California Supreme Court's denial of review, this petition is timely brought. (Rule 13, Rules of the Supreme Court of the United States.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the United States Constitution and California Penal Code section 148 are chiefly involved, along with the Sixth Amendment to the United States Constitution. California Jury Instructions CALJIC 3.30 and 3.31 are also in issue. CALJIC 3.30 as given is reproduced as APPENDIX 4 which follows. CALJIC 3.31 as given is reproduced as APPENDIX 5 attached hereto.

STATEMENT OF THE CASE

On February 10, 1988 petitioner Thakorbhai L. Patel was arrested and subsequently charged with pandering (Cal. Pen. Code §266i) and attempted pimping (Cal. Pen. Code §§664/266h). After a preliminary hearing was conducted in the San Bernardino County Municipal Court, petitioner was held to answer, and the matter advanced to the San Bernardino County Superior Court as Case No. SCR-47384, after which motions were heard.

On April 20, 1988 petitioner Thakorbhai L. Patel was arrested and subsequently charged with pimping (Cal. Pen. Code §266h), maintaining a disorderly house (Cal. Pen. Code §316), and resisting, delaying, or obstructing a public officer (Cal. Pen. Code §148). Petitioner was held to answer after preliminary hearing on this case, and the matter proceeded beyond motions in the San Bernardino County Superior Court as Case No. SCR-48604.

An amended information was subsequently filed incorporating all of the above charges (Clerk's Transcript[1]: pp. 207-209), after the San Bernardino County

[1] Hereinafter abbreviated "C.T."

Superior Court ordered both cases consolidated for trial as Case No. SCR-47384 (see Reporter's Transcript[2] I: p. 8, L. 12-21).

Petitioner was tried for all of the above alleged offenses on May 16, 17, and 18, 1989, and he was found guilty of all five counts by a jury. (C.T.: pp. 205, 206, 210-219.) He was sentenced on August 31, 1989. (C.T.: pp. 304-305.) On September 22, 1989 petitioner's motion to post bond in lieu of serving jail time pending a final result on appeal was granted by the San Bernardino County Superior Court (C.T.: p. 309), following petitioner's timely filing of a notice of appeal on September 20, 1989 of the judgment of convictions against him in the two consolidated cases.

The judgment appealed from, appealable per California Penal Code section 1237(a), was affirmed by the court of appeal on September 11, 1990. After petitioner timely sought review of that decision by the California Supreme Court on October 22, 1990, his petition for review was denied on November 28, 1990, with two justices stating that they were of the opinion that the petition should have been granted. (See APPENDIX 2 attached.) This petition for certiorari timely follows the final action of California's state court of last resort. The remittitur was issued on December 3, 1990. (See APPENDIX 3 attached.)

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[2] Hereinafter abbreviated "R.T."

STATEMENT OF FACTS

Petitioner was the owner of the Palms Motel, which had been frequented by Emma Henderson for years. (R.T. I: p. 134, L. 19 – p. 137, L. 2.) Sometimes she rented a room by the hour there. (R.T. I: p. 137, L. 26 – p. 138, L. 12.) At times she went to the Palms Motel just to engage in prostitution. (R.T. I: p. 139, L. 9-19.) She had rented a room from petitioner on previous occasions. (R.T. I: p. 142, L. 14-18.) She was not told that she could have a particular room, and either put money on the counter or dropped it on the floor, but did not think she gave it to petitioner personally. (R.T. I: p. 144, L. 25 – p. 145, L. 4.) She may have gone to the motel more than once a week on unnamed and unnumbered occasions. (R.T. I: p. 145, L. 15-17.) Sometimes she went to the Palms Motel for other than work purposes. (R.T. I: p. 147, L. 9-12.) She never told petitioner what intent she had for room use when she asked for one, and often used one just to sleep or shower. (R.T. I: p. 148, L. 8-20.) She had heard that prostitution was not allowed on the premises of the Palms Motel. (R.T. I: p. 150, L. 25 – p. 151, L. 4.) Most of the time she would fill out a registration card when she would rent a room there. (R.T. I: p. 152, L. 9-11.)

Ms. Henderson was a convicted felon who had served time in state prison for a drug offense. (R.T. I: p. 147, L. 13-20.) In April of 1988 she agreed to engage in sexual activity with William Sheble and another man. (R.T. I: p. 140, L. 8-10.) On entering the office of the Palms Motel to get a room, petitioner told her that the men she was with were police. (R.T. I: p. 140, L. 11-22.) She obtained a total of $12.00 from Officer Sheble but did not obtain a room key. (R.T. I: p. 140, L. 23 – p. 141, L. 12.) On

this April 20, 1988 date she did not find out what happened to the $12.00 after she brought it to the motel office. (R.T. I: p. 149, L. 24-26.) Emma Henderson said that she did not suggest going to the Palms Motel. (R.T. I: p. 152, L. 19-22.) Doing so was the officers' idea. (R.T. I: p. 146, L. 24 – p. 147, L. 2.) She admitted to pleading guilty to a charge of prostitution sometime in the past. (R.T. I: p. 142, L. 6-8.)

William Sheble testified that he was a sheriff's officer with San Bernardino County working as a vice officer. (R.T. I: p. 235, L. 9-23.) On February 10, 1988 he went with Deputy Jo Ann Miller to the Palms Motel to investigate it. (R.T. I: p. 236, L. 15-18; p. 238, L. 10-15.) Then, on April 20, 1988, he saw Emma Henderson wave at him, so he drove to her, and she mentioned "half and half" for $15.00 apiece. (R.T. I: p. 242, L. 14 – p. 243, L. 28.) She took the undercover officer to the Palms Motel. (R.T. I: p. 244, L. 26 – p. 245, L. 2.)

Emma Henderson went into the motel office with $12.00 given to her by Officer Sheble to get a room, and returned to the van, where she saw a tape recorder in the officer's hand, so began to walk away down the street. (R.T. I: p. 245, L. 22 – p. 246, L. 24.) Officer Sheble then picked up Ms. Henderson again after he told her that he was not a police officer, after she accused him of that. (R.T. I: p. 246, L. 25 – p. 247, L. 11.) On the way to open Room 5 at the Palms Motel, Officer Sheble heard petitioner yell that he was an undercover officer. (R.T. I: p. 247, L. 12-22.) Soon after this, Emma Henderson turned and ran. (R.T. I: p. 247, L. 26 – p. 248, L. 5.) Petitioner said he wanted to see Officer Sheble's identification, because

he was "undercover." (R.T. I: p. 248, L. 6-14.) When petitioner did this, he called the officer "undercover," but not "undercover cop" or "undercover police." (R.T. II: p. 266, L. 27 – p. 267, L. 9.) And, he never said either the words "police officer" or "cop" in Emma Henderson's presence. (R.T. II: p. 267, L. 10-14.)

Special deputy sheriff Larry Mosley testified that he picked up Emma Henderson on April 20, 1988 and took her in a van to the Palms Motel, along with Officer Sheble. (R.T. I: p. 226, L. 22 – p. 227, L. 17.) She then went into the motel office, returned to the van, and began walking toward a room when Larry Mosley heard petitioner yell, "You're undercover. You're undercover," whereupon Emma Henderson began to run until she was caught and arrested by Deputy Mosley. (R.T. I: p. 227, L. 18 – p. 228, L. 16.)

Prior to petitioner saying anything, Emma Henderson was under constructive arrest for solicitation, and not free to leave. (R.T. II: p. 267, L. 15 – p. 268, L. 18.) Prior to this, Emma Henderson had suggested that Officer Sheble had "a bedroom on wheels," but he pushed her to pick a motel to go to. (R.T. I: p. 255, L. 10-21.)

Larry Mosley also testified that on February 10, 1988, while employed as a special deputy with the San Bernardino County Sheriff's Department, he rented a room from petitioner for one night for $35.00 (R.T. I: p. 222, L. 3 – p. 223, L. 14), and then observed about six couples arrive without luggage, rent motel rooms, and stay only about thirty minutes (R.T. I: p. 224, L. 13 – p. 225, L. 26.) The officer did not see what occurred in the rooms because

petitioner told him that he did not allow curtains to be opened in his motel room. (R.T. I: p. 226, L. 1-17.)

Jo Ann Miller testified that she was a San Bernardino County Sheriff's deputy on February 10, 1988, working undercover as a simulated prostitute with the Palms Motel as her "target." (R.T. I: p. 156, L. 8-16.) She went to the motel office and asked petitioner for a room for a short time; was told by him that the room had to rent for an hour; and she then rented a room for $10.00. (R.T. I: p. 158, L. 19 – p. 159, L. 14.) It was noted at trial that other motels also have hourly rates. (R.T. II: p. 265, L. 20-26.)

Jo Ann Miller did not think that she said who she was to petitioner when renting a room from him. (R.T. I: p. 159, L. 4-5.) She was not given a key. (R.T. I: p. 159, L. 27-28.) And, she was not asked to sign a registration card. (R.T. I: p. 160, L. 3-4.) The door to the room was unlocked. (R.T. I: p. 160, L. 3-4.)

The conversation between Deputy Miller and petitioner was tape recorded and reduced to transcript form. (R.T. I: p. 160, L. 10-26.) This and four other such conversations occurring on return visits to the motel that same day were included in Exhibit 20 and played for the jury. (R.T. I: p. 161, L. 11 – p. 162, L. 5.)

On the second visit to the office by Deputy Miller, petitioner was not present. (R.T. I: p. 163, L. 8-23.) She rented a room from this unknown person for $10.00 for an hour, and signed a registration card. (R.T. I: p. 163, L. 22 – p. 164, L. 8.) She went into a room with another officer, and stayed there for about 15 to 20 minutes before leaving. (R.T. I: p. 164, L. 14-16.)

On Deputy Miller's third trip to the motel office, she entered the office and told petitioner that she was with two people, but would just be in a room with one at a time, whereupon petitioner told her that she had to pay $10.00 per person. (R.T. I: p. 170, L. 10-18.) She left the office briefly, returned with $20.00, got a room, and was not required to sign a registration card. (R.T. I: p. 171, L. 22-28.) She did not receive a room key on this occasion. (R.T. I: p. 172, L. 1-2.) Reserve Deputy Dickerson stayed in the room with her for 10 to 15 minutes before all three persons left together. (R.T. I: p. 173, L. 19 – p. 174, L. 22.) She did not recall in what order the men entered the room. (R.T. I: p. 173, L. 21 – p. 174, L. 1.)

On the next return Deputy Miller came with Deputy Fedoruk. (R.T. I: p. 174, L. 23 – p. 175, L. 4.) Upon going to the office on this return visit, petitioner told her that some man had asked about her. (R.T. I: p. 175, L. 13-22.) Again she rented a room from petitioner for $10.00 for one hour. (R.T. I: p. 176, L. 27 – p. 177, L. 2.) She then went to the room with Deputy Fedoruk. (R.T. I: p. 177, L. 3-12.) They were there about 5 to 10 minutes when a buzzer went off, and Deputy Miller saw undercover operative Al Barnett standing near the motel office. (R.T. I: p. 179, L. 17 – p. 180, L. 20.)

Petitioner told Al Barnett that he had to pay for the room. (R.T. I: p. 181, L. 15 – p. 182, L. 2.) Al Barnett then paid petitioner for use of a room. (R.T. I: p. 182, L. 3-8.) No registration card was signed, and no room key was given. (R.T. I: p. 182, L. 12-16.) Jo Ann Miller and Al Barnett then went into a motel room and stayed there 5 to 10 minutes. (R.T. I: p. 182, L. 27 – p. 182, L. 6.) Petitioner was then placed under arrest. (R.T. I: p. 183, L. 7-11.)

Deputy Miller never referred to herself as a prostitute or to men with her as a "John." (R.T. I: p. 186, L. 7-17.) She never told petitioner that she was going to engage in a sex act in the rented room. (R.T. I: p. 186, L. 21-24.) The registration card signed by this witness as Exhibit 11 said above the signature line, "I certify that I am not a prostitute and will not use the room for purpose of prostitution." (R.T. I: p. 192, L. 15-27.) That form also says at the top, "No prostitution allowed," which was read by the undercover officer before she signed it. (R.T. I: p. 192, L. 28 – p. 193, L. 4.) A sign was in the office. (R.T. I: p. 193, L. 9-13.)

San Bernardino County Reserve Sheriff's Deputy Al Barnett testified about a tape-recorded conversation with petitioner admitted in tape form as Exhibit 21. (R.T. I: p. 200, L. 5-13.) This witness said that he did not know whether petitioner understood what "half and half" meant in a sexual context. (R.T. I: p. 214, L. 23-28.) The reserve deputy conceded that he never referred to Deputy Jo Ann Miller as a prostitute, and never told petitioner that he was going to perform a specific sex act with her. (R.T. I: p. 214, L. 3-19.)

In the conversation between Al Barnett and petitioner, petitioner said, "I don't know why they are coming. I just give them my room." (R.T. I: p. 215, L. 18-23.) Initially Al Barnett remembered receiving a key to a room, and signing a registration card in the motel office. (R.T. I: p. 219, L. 16-23.)

The defense offered no evidence at trial. (R.T. II: p. 273, L. 14-17.) Transcript Exhibits 20 and 21, and page 7 of

Transcript Exhibit 19 were read by the jury but not admitted into evidence, because they heard tape recordings of the conversations reported in those transcripts. (R.T. II: p. 280, L. 11-19.)

All money given for a motel room was retrieved by law enforcement officers on April 20, 1988. (R.T. II: p. 258, L. 6-9; p. 265, L. 27 – p. 266, L. 4.) On February 10, 1988 Officer Sheble also recovered all money paid by undercover officers for rooms at the Palms Motel on this date. (R.T. II: p. 268, L. 19 – p. 269, L. 18.)

Pronouncement of judgment was withheld, and petitioner was sentenced to serve 90 days in county jail on weekends, pay a stayed $4,000.00 fine, pay a restitution fine in the sum of $780.00, pay another fine in the sum of $530.00, and be on supervised probation for three years. (R.T. II: p. 342, L. 5 – p. 344, L. 13.) He is currently out on bail pending a final result on review of the judgment.

HOW THE FEDERAL QUESTION IS PRESENTED

Petitioner advances the argument that words uttered by him were protected by the First and Fourteenth Amendments to the United States Constitution as free speech, and that a specific intention to delay or obstruct an officer must be proven beyond a reasonable doubt as an essential element of delay or obstruction of a public officer offense. Petitioner raised this argument and the issue of misinstruction and incomplete instruction of the jury to both the California Court of Appeal and the California Supreme Court.

While this argument was rejected by the California Court of Appeal, and hearing was denied by the California Supreme Court, two justices of the California Supreme Court believed that the petition for review should have been granted. (See APPENDIX 1 and APPENDIX 2 attached.)

REASONS FOR GRANTING THE WRIT

This case presents the Court with an opportunity to announce the limits of nebulous and all-inclusive penal statutes that seek to punish delaying or obstructing a public officer engaged in the discharge of his official duties, when speech alone is assigned as the sole offending act. This Court's ruling in *Houston v. Hill*, 482 U.S. 451, 96 L.Ed.2d 398, 107 S.Ct. 2502 (1987) can be clarified and specifically applied to a much more prevalent penal statute than the city ordinance in issue in that case. Protected speech can be further defined within the meaning of the First Amendment to the United States Constitution as applied to the states through operation of the Fourteenth Amendment to the United States Constitution.

The state statute in issue (California Penal Code section 148) can either be declared unconstitutionally overbroad or unconstitutionally applied where, as in the instant case, specific intent to delay or obstruct a public officer is not made a required element of such an offense grounded entirely upon alleged words spoken by the defendant. The precious right of freedom of expression requires that the injustice below be rectified, and that guidance be given to other courts so that such an error is

not repeated. This case squarely presents the issue of balancing a person's right to freedom of expression against a public officer's right to carry out his or her official duties without undue interference or disruption.

Certiorari should also be granted here to address and remedy instances of erroneous and/or confusing jury instructions which can infect jury deliberations, and in turn make all verdicts resulting from such deliberations unreliable and subject to invalidation. Because the erroneous reading of a general intent instruction for a specific intent crime (California Penal Code section 148 in a verbal context) likely confused the jury below, the probability that such error also caused confusion concerning the legal standards for deciding alleged companion crimes is so great that the entire judgment of convictions below should be reversed.

ARGUMENT

I.

WHERE FREE SPEECH IS IN ISSUE, ORAL UTTERANCES ADVANCED BY THE STATE AS A BASIS FOR DELAY OR OBSTRUCTION OF A PUBLIC OFFICER ENGAGED IN THE DISCHARGE OF AN OFFICIAL DUTY MUST BE COUPLED WITH SPECIFIC INTENT TO DELAY OR OBSTRUCT THE OFFICER, IN ORDER TO SUSTAIN A CRIMINAL CONVICTION GROUNDED UPON SPOKEN REMARKS.

Petitioner was convicted of a violation of California Penal Code section 148, which in pertinent part provides that "Every person who willfully resists, delays, or obstructs any public officer, peace officer . . . in the

discharge or attempt to discharge any duty of his or her office or employment . . . is punishable by a fine not exceeding one thousand dollars ($1,000) or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment." To prove the charge the prosecution was required in all cases to prove the following elements of the offense: 1) resistance, delay, or obstruction; 2) of a public officer; 3) engaged in some official duty being discharged or being attempted to be discharged by the officer; 4) with willfulness on the part of the defendant. (*People v. Perry*, 79 Cal.App.2d Supp. 906, 907 (1947).)

In the case on review no physical resistance was even suggested by the prosecution, so delay or obstruction are the only prongs of the statute that could possibly be relied upon to prove that such an offense occurred. What duty was being discharged by William Sheble while petitioner uttered the words "You're undercover; you're undercover" was never clearly shown, since Emma Henderson was already in constructive police custody after having allegedly committed a criminal offense prior to the claimed delay or obstruction by petitioner. So, it appears that even the basic elements of a California Penal Code section 148 violation were not proven in the trial court below.

Additionally, to not run afoul of the constitutionally guaranteed right to freedom of expression, in a situation like the case on review, where utterances alone are cited as the basis for delay or obstruction, for a conviction of a violation of California Penal Code section 148 to stand, the prosecution must prove beyond a reasonable doubt that the defendant acted with the specific intention of

delaying or obstructing the officer in question. Because utterances are protected by the First Amendment to the United States Constitution, applicable to the states through operation of the Fourteenth Amendment to the United States Constitution, in the absence of such specific intent and words likely to cause a violent action against an officer or to cause a riotous stampede, mere words such as "You're undercover; you're undercover" cannot be held to constitute a violation of California Penal Code section 148. This is a logical application of the holding in *Houston v. Hill*, 482 U.S. 451, 96 L.Ed.2d 398, 107 S.Ct. 2502 (1987). For, " . . . the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." (*Id.*, 482 U.S. at 461, 96 L.Ed.2d at 412, 107 S.Ct. at 2509.)

> 'Speech is often provocative and challenging. . . . [But it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.' (*Id.*, citing *Terminiello v. Chicago*, 337 U.S. 1, 4, 93 L.Ed. 1131, 1134, 69 S.Ct. 894, 896 (1949).)

"First Amendment freedoms may not be infringed absent a compelling governmental interest. Even then, any governmental regulation must be carefully tailored, so that rights are not needlessly impaired." (*United Steelworkers of America v. Sadlowski*, 457 U.S. 102, 111, 72 L.Ed 2d 707, 715, 102 S.Ct. 2339, 2345 (1982), rehg. den. 459 U.S. 899, 74 L.Ed.2d 160, 103 S.Ct. 199 (1982).) Expressions of disapproval toward a peace officer fall "squarely within the protective umbrella of the First Amendment and any action to punish or deter such speech . . . is

categorically prohibited by the Constitution." (*Duran v. City of Douglas, Ariz.*, 904 F.2d 1372, 1378 (9th Cir. 1990).)

> A speaker may freely attack institutions, trades, occupations, groups, races, and ethnic majorities in this country in hopes that others will discriminate against them. Those who implement such abuses in response to an obnoxious exhortation may be punished under appropriate statutes. But one of the prices we pay to retain our liberty of expression is that the speaker may not, unless the speech is obscene or threatens to produce an immediate violent reaction. (*Long v. Valentino*, 216 Cal.App.3d 1287, 1295 (1989).)

Likewise, one may express his views in an orderly fashion on a public street when he is rightfully there. (*Flower v. United States*, 407 U.S. 197, 198-199, 32 L.Ed.2d 653, 656, 92 S.Ct. 1842, 1843 (1972).) The rights of a state to limit expressive activities on public streets are drawn within quite narrow confines. (*Perry Ed. Assn. v. Perry Local Ed. Assn.*, 460 U.S. 37, 45, 74 L.Ed.2d 794, 804, 103 S.Ct. 948, 954 (1983).) Because Emma Henderson was unlikely to become violent on hearing petitioner's spoken words, and the uttered words were not "fighting words," they were constitutionally protected, under Article I, section 2 of the California Constitution, as well as under the United States Constitution's First and Fourteenth Amendments.

The record below also fails to show that petitioner intended anything to happen as a result of his spoken words. He did not say "Run!" to Emma Henderson. And he made no move to interfere with her or Officer Sheble as petitioner spoke.

While this speech-centered alleged offense should have been treated at trial as a specific intent crime, the jury deciding petitioner's fate was not instructed that in order for it to return a guilty verdict for a violation of California Penal Code section 148, it must first determine that petitioner had a specific intent to resist, delay, or obstruct Officer Sheble in the conduct of his duties at the time petitioner said "You're undercover; you're undercover." There was also no showing that petitioner was directing his remarks to Emma Henderson rather than the officer.

The absence of a specific intent jury instruction for California Penal Code section 148, such as CALJIC 3.31 rather than CALJIC 3.30 which was given (see APPENDIX 4 and APPENDIX 5 attached); the verbal nature of the claimed delay or obstruction; and the lack of a defined duty that was allegedly interrupted by petitioner's protected speech should cause his conviction for resisting, delaying, or obstructing a public officer to be reversed. This will assure the " 'ceaseless vigilance' " required " ' . . . to prevent erosion [of First Amendment rights] . . . by the states.' " (*Stanley v. Georgia*, 394 U.S. 557, 563, 22 L.Ed.2d 542, 548-549, 89 S.Ct. 1243, 1247 (1969), citing *Roth v. United States*, 354 U.S. 476, 488, 1 L.Ed.2d 1498, 1509, 77 S.Ct. 1304, 1311 (1957).) The "immediate breach" of the peace hypothesized by the California Court of Appeal never materialized, and it is dangerous indeed to guess at the jury's conclusions, especially when it was misinstructed concerning the necessary elements of a California Penal Code section 148 offense.

If the statute in question is construed in any other fashion than to require a specific intent where speech is the crux of the alleged offense, it would both criminalize constitutionally protected speech and allow peace officers unconstitutional discretion in enforcing the statute, making the penal provision unconstitutionally overbroad and facially invalid, just as was found in *Houston v. Hill, supra.*

II.

THE TRIAL JUDGE MUST INSTRUCT THE JURY *SUA SPONTE* THAT SPECIFIC INTENT TO DELAY OR OBSTRUCT A PUBLIC OFFICER IS A REQUIRED ELEMENT OF DELAYING OR OBSTRUCTING A PUBLIC OFFICER, WHERE ORAL UTTERANCES ARE PRESENTED AS THE SOLE BASIS FOR SUCH POSSIBLE DELAY OR OBSTRUCTION.

For the reasons stated in Section I. above, and in conformity with a logical application of this Court's holding in *Houston v. Hill,* 482 U.S. 451, 96 L.Ed.2d 398, 107 S.Ct. 2502 (1987), the trial judge's failure to instruct the jury that California Penal Code section 148 requires a specific intent rather than a general one in the factual context presented, *sua sponte,* and to delineate the parameters of constitutionally protected free speech, constituted prejudicial and reversible error. A different result would probably have occurred if the jury had been instructed that it was required to find specific intent rather than general intent for any California Penal Code section 148 offense.

With respect to failure to properly instruct a jury, "It cannot be said that, under correct instructions, a different

verdict would have been improbable; therefore, the erroneous rulings constitute a miscarriage of justice, within the meaning of the constitutional provision," which until November 8, 1966 was Article VI, section 4½, and is now Article VI, section 13 of the California Constitution. (*People v. Hamilton*, 33 Cal.2d 45, 51, 198 P.2d 873, 877 (1948).) Reversal is appropriate because " . . . it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the errors committed by the trial court in failing to give an instruction on the law . . . ," as in *People v. Bevins*, 54 Cal.2d 71, 78, 351 P.2d 776, 780 (1960). " . . . the court has a duty to give instructions on the general principles of law governing the case, even though not requested by the parties, but it need not instruct on specific points developed during trial unless requested. . . . " (*Id.*, 54 Cal.2d at 77, 351 P.2d at 780.) Instruction on the correct intent to be applied to the statute was an essential principle of law governing the case on review, so the trial judge breached a *sua sponte* duty in not reading the jury a specific intent instruction concerning an alleged violation of California Penal Code section 148. "An instruction is necessary if it is vital to a proper consideration of the evidence by the jury." (*People v. Putnam*, 20 Cal.2d 885, 890, 129 P.2d 367, 370-371 (1942); *People v. Baker*, 42 Cal.2d 550, 576, 268 P.2d 705, 721 (1954).)

Concerning an examination of the record for a miscarriage of justice, "Error in an instruction which ordinarily would not prejudice the rights of a defendant may justify a reversal of the judgment where the jury is misdirected or misled upon an issue vital to the defense and the evidence does not point unerringly to the guilt of the

person accused." (*People* v. *Rogers*, 22 Cal.2d 787, 807, 141 P.2d 722, 732 (1943); *People* v. *Robinson*, 61 Cal.2d 373, 395, 392 P.2d 970, 984 (1964).) A requirement of specific intent is an issue that was vital to the defense at trial, and petitioner's behavior was so innocuous that it can hardly be said that the evidence pointed unerringly to his guilt with respect to a violation of California Penal Code section 148.

Article VI, section 13 of the California Constitution provides as follows:

> No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

An examination of the entire record below clearly reveals that a miscarriage of justice occurred at petitioner's trial. This manifest injustice deprived petitioner of the fair trial to which he was entitled pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, and pursuant to Article 1, section 15 of the California Constitution. The prejudicial errors committed cry out for remediation.

III.

THE TRIAL COURT'S FAILURE TO PROPERLY INSTRUCT THE JURY ON THE REQUISITE INTENT REQUIRED FOR A CRIMINAL CONVICTION INFECTED JURY DELIBERATIONS TO SUCH AN EXTENT THAT PETITIONER WAS DEPRIVED OF A FAIR TRIAL CONCERNING ALL COUNTS CHARGED AGAINST HIM.

The failure to properly instruct the jury about the requisite intent for a California Penal Code section 148 violation adversely affected more than just the verdict directed toward that count of the amended information. All verdicts were infected by what must have been confused and easily awry jury deliberations. Taking into account that the jury was read special intent instructions addressed to the pandering and attempted pimping charges (C.T.: p. 250, pp. 252-254, and p. 257, reproduced and attached respectively as APPENDIX 5, APPENDIX 6, and APPENDIX 7), along with a general intent instruction addressed to pimping, maintaining a disorderly house, and obstructing a peace officer (C.T.: p. 249, reproduced and attached as APPENDIX 4), it is impossible to know how jurors resolved the conflicting instructions or " . . . to determine from the evidence which of the conflicting instructions formed the basis of the verdict reached by the jury" for each individual count. (See *People v. Kirkes*, 39 Cal.2d 719, 729, 249 P.2d 1, 7 (1952), and *People v. Bernhardt*, 222 Cal.App.2d 567, 593 (1963).) This is especially true since jurors were told of one required intent for the crime of attempted pimping and another for the crime of pimping.

What is known with assurance is that jurors were misinformed about the appropriate intent required for a violation of California Penal Code section 148 that involved speech alone. That is enough by itself to invalidate the verdict dealing with that charge (see *People v. Zerillo*, 36 Cal.2d 222, 232, 223 P.2d 223, 229-230 (1950)), and to result in infection of the remainder of verdicts reached. Under these circumstances, all verdicts returned are cast in substantial doubt, because the inconsistent and erroneous instructions given to the jury resulted in a clear miscarriage of justice and should be found to constitute reversible error. (*Id.*, 36 Cal.2d at 233, 223 P.2d at 230; *People v. Kirkes, supra*, 39 Cal.2d at 729, 249 P.2d at 7.)

CONCLUSION

For all of the reasons stated above, petitioner submits that justice and a need to clarify the permissible interaction of persons exercising their free speech rights with a public officer's right not to be delayed or obstructed in the performance of his or her duties present this Court with ample reasons to issue the writ prayed for. Accordingly, petitioner respectfully requests that the Court issue a writ of certiorari to review the decision of the California Court of Appeal in this case.

Respectfully submitted,

/s/ Dennis S. Tilton
DENNIS TILTON
Attorney for Petitioner
Thakorbhai L. Patel

APPENDIX 1

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. THAKORBHAI L. PATEL, Defendant and Appellant.	E007180 (Super.Ct.Nos. 47384/48604) OPINION FILED SEP 11 1990

Appeal from a judgment of the Superior Court of San Bernardino County. James A. Edwards, Judge. Affirmed.

Dennis S. Tilton for Defendant and Appellant.

John K. Van De Kamp, Attorney General, Richard B. Iglehart, Chief Assistant Attorney General, Harley D. Mayfield, Senior Assistant Attorney General, Robert M. Foster, Supervising Deputy Attorney General, and M. Howard Wayne, Deputy Attorney General, for Plaintiff and Respondent.

FACTS

In consolidated actions, a jury convicted Thakorbhai Patel of pandering (Pen. Code[1], § 266i), attempted

[1] All further code references are to the Penal Code unless otherwise indicated.

pimping (§§ 664/266h), pimping (§ 266h), maintaining a disorderly house (§ 316), and resisting/obstructing/delaying an officer (§ 148). He was granted probation and appeals, claiming insufficiency of the evidence and jury instruction error. We reject his contentions and affirm. The pertinent facts surrounding each count will be discussed below.

1. *Insufficient Evidence*

a. *Of Pandering*

As to count 1, Patel was charged with "willfully, unlawfully, and by threats, violence, promises, a device, and scheme, caus[ing], persuad[ing], and encourag[ing] [an undercover policewoman posing as a prostitute] to become a prostitute.[2] He now claims there was insufficient evidence to support his conviction of this offense.

The evidence at trial showed that the undercover policewoman, dressed in a conspicuous fashion, went to Patel's motel for the first time around 3 p.m. on February 10, 1988. She asked him how much it would cost to rent a

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[2] In his reply brief, Patel claims, as a further basis for his argument the evidence was insufficient, that the facts did not demonstrate that he "successfully induced a person to become an inmate of a house of prostitution. . . . " A violation of section 266i can be committed in one of several distinct ways. (*People v. Fixler* (1976) 56 Cal.App.3d 321, 327, disapproved on other grounds in *People v. Freeman* (1988) 46 Cal.3d 419, 426, fn. 6.) The manner described by Patel above relates to subdivision (c) of section 266i, with which Patel was *not* charged, having been accused instead under subdivision (b).

room "for a short time."[3] Patel replied, "If you do *work* short time, we don't give [you a] room." (Emphasis added.) He then informed her that she would have to rent the room by the hour, which she said would cost $10. She gave him the money. Patel did not ask her to sign a registration card and he did not provide her with a key as the door to the room she was given was not locked. She walked to the room accompanied by a male undercover officer who was posing as her customer. They remained in the room for 15-20 minutes, then departed in the latter's van.

She returned a second time and was waited on in the motel office by someone other than Patel. He asked her to sign a registration card and she again rented a room for $10 a hour. She entered the room with another male undercover officer, stayed 15-20 minutes and left with him.

She returned a third time around 6 p.m. with two undercover male officers. When Patel asked her how many she had with her, and she told him, he informed her she could not have more than one in the room. She told Patel, " . . . I was going to *do* both, . . . one . . . at a time. I was gonna have one go in and then come out and then another one." (Emphasis added.) Patel informed her that it would cost her $10 for each of the two men. She told him she would go out to the vehicle in which they were waiting in the parking lot and tell them. She returned to the office and told Patel she was renting the

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[3] Another undercover police officer testified at trial as an expert witness that "short time" in prostitute parlance referred to the time it takes a customer to reach orgasm.

room for the two, and she paid him $20. Patel did not have her sign a registration card and he provided her no key. She went into the room and left a half-hour later.

A short time thereafter, a male undercover officer posing as a "big spender" came to the motel looking for the female officer. Patel instructed him to wait for her. Patel told him that "girls . . . [¶] don't [stay] overnight" at his motel, "[o]nly [a] short time." He told the officer he had hourly rates. Patel also told the officer that the latter could "get girls" at a local bar and he provided him with directions to it. The officer then left.

After a short time, the female officer reappeared with another male undercover officer and Patel told her about the man who had been there looking for her. She confirmed that she had told the man to meet her there at 7 p.m. Patel told her he had informed the man to come back for her. She replied, " . . . [G]ood . . . because I can't believe I'm doing good tonight . . . I'm making some money, but that man is high dollars, real high dollars." Patel repeated to her that he told the man to come back and she again expressed pleasure at the prospect. She then told Patel that she had a gentleman with her and she needed a room right then. Patel offered to tell the "big spender" when he returned to wait for her. Patel told her "[when] you . . . finish up . . . [¶] . . . you wait in the room" for the "big spender" as he would send him up to her when he arrived. He also informed her that he would need another $10 when the "big spender" arrived. She told Patel that she was making a lot of money that night and he acknowledged same. She asked him if the following night she could rent a room for the entire night for one price thus avoiding having to pay "per head." He

said she could not, that she would have to "pay by the man," $10 each time. Patel explained this was so because he had the rooms cleaned after each use. She gave Patel $10 for the room, signed no card and received no key. She went to the room with the undercover officer who had accompanied her to the motel.

After being in the room for awhile, a buzzer inside the room went off. She walked outside and saw the "big spender" standing talking to Patel. Patel had already told him to wait for the woman as she was "busy." When the three met, Patel asked for $10 for the room. The "big spender" asked, " . . . [D]oes this come out of the 50 bucks for the half and half[4] or what?" The female said no and Patel laughed. The female told the "big spender" that he had to pay for the room. He handed Patel a $50 bill and Patel gave him $40 in change. Patel then wished him luck. Patel did not have them sign a registration card and he provided no key. They went into the room and emerged 5-10 minutes later.

Still another undercover officer who had rented a room for the same night, paying $35 and signing a registration card, saw six couples besides his fellow officers go into various rooms that evening, without luggage, and stay only about a half-hour before leaving. He watched them, and surreptitiously photographed some of them, through the open window of the room he had rented. At one point, Patel came to his room and told him it was

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[4] This undercover officer testified at trial as an expert witness that "half and half" meant half vaginal sex and half oral sex.

against the policy of the motel for him to have the curtains of his window open.

As the People contended at trial and here on appeal, the foregoing facts demonstrate that Patel provided a clean, anonymous and relatively secluded haven for what he knew were prostitution activities[5] and he did so with the intention of encouraging and, in fact, did encourage someone he believed to be a prostitute to ply her trade. Thus, substantial evidence supports the conviction.

In his brief, Patel makes a number of assertions and cites a number of cases which he argues undermine the verdict. They do not. First, he states, "Appellant was not shown by either direct or circumstantial evidence to have the required specific intent to influence [the undercover policewoman] to become a prostitute. (See *People v. Mathis* (1985) 173 Cal.App.3d 1251.)" The evidence demonstrates otherwise. Moreover, *Mathis* has no application to this issue. In *Mathis*, the issue was over a jury instruction that defined "procure" in such a way that the defendant could be guilty of pandering simply by assisting, or aiding and abetting, an act of prostitution. Division One of this court held that the requisite intent to influence a person to become a prostitute may be inferred from acts of assistance, but intent was not *necessarily* shown by assistance. (*Id.*, at pp. 1255-1256.)

Patel goes on to assert, "Appellant did not seek out the [female] undercover officer to encourage her to

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[5] It was entirely reasonable for the jury to infer Patel knew what was going on in his motel from his conversations with the female officer and with the "big spender."

become a prostitute. (See *People v. Osuna* (1967) 251 Cal.App.2d 528.) *Osuna*, however, does not support Patel's claim that the defendant must seek out the potential prostitute. *Osuna* dealt with a subdivision of section 266i not relevant here which punishes placing a female in a locale where prostitution is allowed or encouraged. The sole issue relevant to section 266i in *Osuna* was whether the hotel room the defendants supplied qualified as a house of ill repute.

Patel next claims, "Neither did he offer to pay her to engage in sexual activities, as in *People v. Bell* (1988) 201 Cal.App.3d 1396." However, *Bell* did not hold that such activity, and none other, was necessary to sustain a conviction under section 266i. In fact, *Bell* held, "This statute covers a wide range of behavior and we need not here attempt to delineate its full scope, or determine whether its proscriptions would or would not apply to the hypotheticals advanced by appellant. It is sufficient for our present purpose to hold that its wording is broad enough to encompass the situation where, as here, one adult offers to pay money to another to induce a young child to engage in sexual activities." (*Id.*, at pp. 1399-1400.)

Patel further argues, "Nor did he seek to expand a known prostitute's operation. (*People v. Jeffers* (1987) 188 Cal.App.3d 840; *People v. Almodovar* (1987) 190 Cal.App.3d 732.) [*Sic.*]" Neither of these cases so hold, nor do they even address such an issue. Instead, they quote *People v. Hashimoto's* (*People v. Hashimoto* (1976) 54 Cal.App.3d 862) holding that section 266i was designed to "discourag[e] persons . . . from augmenting and

expanding a prostitute's operation, or increasing the supply of available prostitutes[,]" in the context of the severity of the sentence imposed for violations of the section.

Next Patel contends, "Without any proof that appellant had full knowledge of the nature of an act of prostitution that would take place, he cannot properly stand convicted of pandering by encouraging. (See *People v. Montgomery* (1941) 47 Cal.App.2d 1, 22.)[6] First, as stated above, it is reasonably inferable from the evidence that Patel was well aware of the nature of the female officer's apparent activities. Moreover, *Montgomery* does not stand for the proposition that the defendant must have such knowledge on page 22 or any other page for that matter. The import of what the court holds on that page is as follows: "Appellant concedes that 'all appellant did was to permit [the prostitute] to work as [one] in houses of appellant.' This admission of appellant effectively disposes of all of her contentions as to the sufficiency of the evidence, for if appellant knowingly permitted [the prostitute] to work for appellant . . . in appellant's houses of prostitution appellant was guilty of having procured the said female person as an inmate for a house of prostitution within the meaning of the . . . pandering act."

Finally, Patel points out that his activities here were far different from those of the motel manager in *People v. Frey* (1964) 228 Cal.App.2d 33. However, *Frey* does not hold that the activities in it, *and only those*, are all that constitute a violation of section 266i. As decisions Patel

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[6] *Montgomery* was disapproved on other grounds in *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301, fn. 11, and in *People v. Dillon* (1983) 34 Cal.3d 441, 454, fn. 2.

himself cites hold, section 266i covers a wide variety of activities. Patel's points have no merit.

b. *Of Attempted Pimping*

Patel claims there was insufficient evidence to sustain his conviction of attempted pimping on February 10. Section 266h, of which he was convicted in this regard, provides: "Any person who, knowing another person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of the person's prostitution, or from money loaned or advanced to or charged against that person by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, or who solicits or receives compensation for soliciting for the person, is guilty of pimping . . . . " The jury here was instructed as to only the first half of the section, no reference being made to the solicitation portion.[7] Ignoring this fact, Patel argues,

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[7] The jury was instructed:

"Defendant is accused in Count [ ] 2 of the information of having attempted to commit the crime of pimping, a violation of Section [s] 664/266h of the Penal Code . . . .

"Every person who, knowing another person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of that other person's prostitution, or from money loaned or advanced to or charged against that other person by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, is guilty of the crime of pimping in violation of Penal Code Section 266h.

(Continued on following page)

"[O]ne is not guilty of this offense unless he got money for solicitation on behalf of a prostitute for attempted pimping." As this court made clear in *People v. McNulty* (1988) 202 Cal.App.3d 624, 630, "[S]ection 266h can be violated in either of two basic ways: (1) by *deriving support* from the earning of another's act of prostitution *or* (2) by *soliciting*. In order to violate the statute by soliciting, there must be *either* the receipt of compensation for soliciting for a prostitute *or* the solicitation of compensation for soliciting for a prostitute.[8] (*People v. Smith* (1955) 44 Cal.2d 77, 79 . . . .)" (Emphasis added and original.) In *People v. Frey, supra,* 228 Cal.App.2d at page 53, the court held, "Appellant . . . contends that [his] renting a room in the hotel [he owned and managed] to a prostitute could not constitute receiving money from the proceeds of prostitution. The evidence in the present case shows an

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(Continued from previous page)

"In order to prove such crime each of the following elements must be proved:

"1. A person knew that another person was a prostitute, and

"2. Such person lived or derived support or maintenance in whole or in part from the earnings or proceeds of the other person's prostitution, or from money loaned or advanced to or charged against that other person by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed[.]

"Prostitution is engaging in sexual intercourse or any lewd act between persons for money or other consideration."

[8] Patel's reliance on this sentence is misplaced as the jury was never given the option of convicting him based on solicitation.

arrangement whereby appellant did derive additional rent from the tenants that were provided prostitutes. . . ." Likewise, evidence here showed that Patel derived income from renting the rooms for purposes of prostitution in addition to that which he normally charged for an overnight stay. In fact, he would not allow the female undercover officer to rent for the entire night, as he had the male officer, insisting that she pay "per man."

Patel further asserts that "since he had no knowledge that [the undercover policewoman] was a prostitute (or even a simulated one), and . . . prostitution . . . activities were not expressly discussed by appellant and her . . . appellant was convicted on insufficient evidence of attempted pimping." First, as stated before, we disagree that the evidence did not permit a reasonable inference that Patel believed the female officer to be a prostitute. Certainly, his conversations with her and with the "big spender" indicated otherwise. Moreover, Patel cites no precedent requiring one convicted of pimping to have expressly discussed illegal activities with the prostitute,[9] although this too is reasonably inferable from the facts deduced at trial. Patel's point has no merit.

c. *Of Pimping*

Patel claims there was insufficient evidence to support his conviction of pimping on April 20, 1988, a little over two months after the first incident. On that day, two

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[9] Nor is there any requirement, as Patel asserts in his reply brief, that his entire motel business was " 'primarily a pimping operation[.]' "

male undercover police officers riding in a van picked up a prostitute, who directed them to Patel's motel. At trial, she admitted frequenting the motel at least once a week and said she committed acts of prostitution there. She said she rented rooms from Patel and paid $8-12 for one or two hours, often not signing a registration card. On the way to the motel, the officers and the prostitute agreed that she would perform sexual services for them for $15 each. Upon reaching the motel, the officers gave the prostitute $10 for the room rental, but she returned to the van saying she needed another $2. They gave her the money and she paid Patel in the office. She returned to the van and one of the officers began walking towards the room with her. They had no key, but the room was unlocked. Before they were able to go inside, Patel spotted the officer and recognized him as one who had been involved in the February sting operation. He yelled out that the officer was "undercover" and the prostitute took off running, but was stopped by the other officer. Patel later admitted that he had filled out a registration card for the prostitute, claiming she did not know how to write.

As to his insufficiency of the evidence claim, Patel reasserts the points he made in connection with the attempting pimping count, all of which have already been disposed of here. Additionally, as to the facts surrounding this particular count, he claims that the evidence did not show that he knew the prostitute definitely was one. However, as with the female undercover officer during the February incident, this is reasonably inferable from the fact that the woman had rented rooms for short periods of time from Patel in the past and from the type

of activities occurring at the motel as observed by the officers in February.

d. *Of Maintaining a Disorderly House*

The jury was instructed as to this count that "Every person who keeps any disorderly house, or any house for the purpose of prostitution, or any house of public resort, by which the peace, comfort, or decency of the immediate neighborhood is habitually disturbed, or who keeps any inn in a disorderly manner; and every person who lets any apartment or tenement, knowing that it is to be used for the purpose of prostitution, is guilty of a misdemeanor." (CALJIC No. 16.420.)

As with all his other arguments, Patel focuses on one definition of the charged offense and claims there was insufficient evidence of that definition, ignoring the fact that the evidence fits one or more of the other definitions. In this case, he claims there was insufficient evidence he kept a disorderly house because people at his motel were not disturbing others and exposing themselves, which would fit under the third alternate definition of the crime. The fact remains that the evidence here showed that Patel maintained a motel in which he knowingly permitted and assisted acts of prostitution, for which he made a profit. Therefore, he kept a house for the purpose of prostitution.

e. *Of Resisting/delaying/obstructing an Officer*

Patel first claims that there was insufficient evidence to sustain his conviction because there was no resistance.

Again, he ignores the alternate aspects of the crime, namely, delaying and obstructing which were demonstrated when he identified the officer as being undercover, which caused the prostitute to take off running and prematurely ended the sting operation. Patel also claims it was unclear what duty the officer was performing since the prostitute was already "in constructive custody after having committed a criminal offense" which, we presume, was her solicitation of the officers in the van. Without voicing our opinion whether the prostitute was indeed in constructive custody at the time of Patel's interference, we need only say that even if she was, this fact is irrelevant. If the officers' only objective was to arrest her, they would have done so in the van. Obviously, their overriding purpose was to investigate activities at Patel's motel and that operation was ongoing until Patel caused its premature termination.

Patel also claims that his actions cannot constitute a violation of section 148, which governs resisting, obstructing and delaying an officer, because they were protected speech under *Houston v. Hill* (1987) 482 U.S. 451. In *Hill*, the Supreme Court struck down as facially invalid for overbreadth a city ordinance that prohibited anyone from "interrupt[ing] any policeman in the execution of his duty . . . . " The Court concluded that the law should have been limited to words that " ' "inflict injury or tend to incite an immediate breach of the peace." ' " However, the jury here could have reasonably concluded that Patel's words were designed to and did in fact incite such an immediate breach, i.e., the prostitute's running from the scene. Therefore, we are not persuaded that *Hill*

prohibits a finding of guilt as to section 148 here.[10] Beyond that, there is no precedent holding that section 148 is facially invalid.

2. *Jury Instruction*

Patel argues that under compulsion of *Hill* and a case which he in his reply brief concedes was decertified by the California Supreme court, the trial court was obliged, sua sponte, to instruct that a violation of section 148 required specific intent. *Hill* makes no such holding, and, of course, the decertified case is of no value. In the absence of any other authority, which Patel fails to cite, we are compelled to reject his contention.

DISPOSITION

The judgment is affirmed.

NOT FOR PUBLICATION

/s/ Hollenhorst
Acting P.J.

We concur:

/s/ Dabney
J.

/s/ Timlin
J.

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[10] Nor can we agree with Patel that *Hill* requires the impediment to the officer to be *physical*. Hill made no such holding.

APPENDIX 2

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Fourth Appellate District, Division Two,
No. E007180
S018014

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

(Filed Nov. 28, 1990)

THE PEOPLE, Respondent

v.

THAKORBHAI L. PATEL, Appellant

Appellant's petition for review DENIED.

Mosk, J. and Broussard, J. are of the opinion the petition should be granted.

LUCAS
Chief Justice

APPENDIX 3

COURT OF APPEAL

STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

** REMITTITUR **

PEOPLE OF THE STATE OF CALIFORNIA	)	Case No. E007180
Plaintiff-Respondent	)	Superior Ct. No. SCR47384
VS.	)	
PATEL, THAKORBHAI L	)	County of
Defendant-Appellant	)	San Bernardino

I, STEPHEN M. KELLY, Clerk of the Court of Appeal, State of California, Fourth Appellate District, certify the attached is a true and correct copy of the original opinion or decision entered in the above entitled cause on September 11, 1990 and this opinion or decision has now become final.

Witness my hand and seal of the Court this December 3, 1990.

Stephen M. Kelly, Clerk

By: ROBERT CONN
Deputy Clerk

cc: All parties (Copy of remittitur only, Rule 25(e), California Rules of Court).

APPENDIX 4

No. . . . . .

In the crime[s] charged in Count[s] 3, 4, and 5 of the information, [namely,] pimping, maintaining a disorderly house, and obstructing a peace officer, there must exist a union or joint operation of act or conduct and general criminal intent. To constitute general criminal intent it is not necessary that there should exist an intent to violate the law. When a person intentionally does that which the law declares to be a crime, [he] [she] is acting with the general criminal intent, even though [he] [she] may not know that [his] [her] act or conduct is unlawful.

Given:

/s/ James A. Edwards
Judge

EXACT COPY OF CALJIC 3.30 (FIFTH EDITION)
CONCURRENCE OF ACT AND GENERAL CRIMINAL INTENT

APPENDIX 5

No. . . . . .

In [each of] the crime[s] [and] [allegations[s]] charged in Count[s] 1 & 2, and of] the information, [namely,] pandering, attempted pimping and ___, there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless such specific intent exists the crime [or allegation] to which it relates is not committed.

[The specific intent required is included in the definition[s] of the crime[s] [or] [allegation[s]] charged.]

[The crime of ___ requires the specific intent to ___.]

[And the crime of ___ requires the specific intent to ___.]

[And the allegation of ___ requires the specific intent to ___.]

Given:

/s/ James A. Edwards
Judge

EXACT COPY OF CALJIC 3.31 (FIFTH EDITION)
CONCURRENCE OF ACT AND SPECIFIC INTENT

APPENDIX 6

No. . . . . .

[Defendant [___] is accused in [Count[s] 1 of] the information of having committed the crime of pandering, a violation of Section 266i of the Penal Code.]

Every person who with the specific intent to influence another person to [become] [or] [continue to be] a prostitute,

[by promises, or by any device or scheme, causes, induces, persuades or encourages another person to become a prostitute],

[receives or gives, or agrees to receive or give, any money or thing of value for procuring, or attempting to procure, another person for the purpose of prostitution, or to come into this state or leave this state for the purpose of prostitution], is guilty of a violation of Section 266i of the Penal Code.

In order to prove the commission of such crime, the following elements must be proved:

[1. A person by promises, or by any device or scheme, caused or induced, persuaded or encouraged another person to become a prostitute,] or

[1. A person received or gave, or agreed to receive or give, money or thing of value for procuring or attempting to procure another person for the purpose of prostitution, or to come into this state or to leave this state for the purpose of prostitution,] and

2. Such procuring, causing, inducing, encouraging or persuading was accomplished by [promises], [or] [any device or scheme], and

3. The person procuring, causing, inducing, persuading or encouraging engaged in such conduct with the specific intent to influence the other person to [become] [or] [continue to be] a prostitute.

Prostitution is engaging in sexual intercourse or any lewd act between persons for money or other consideration.

Given:

/s/ James A. Edwards
Judge

EXACT COPY OF CALJIC 10.71 (FIFTH EDITION)
PANDERING - DEFINED

APPENDIX 7

No. . . . . .

An attempt to commit a crime consists of two elements, namely, a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.

In determining whether or not such an act was done, it is necessary to distinguish between mere preparation, on the one hand, and the actual commencement of the doing of the criminal deed, on the other. Mere preparation which may consist of planning the offense or of devising, obtaining or arranging the means for its commission, is not sufficient to constitute an attempt. However, acts of a person who intends to commit a crime will constitute an attempt where those acts clearly indicate a certain, unambiguous intent to commit that specific crime. Such acts must be an immediate step in the present execution of the criminal design, the progress of which would be completed unless interrupted by some circumstance not intended in the original design.

Given:

/s/ James A. Edwards
Judge

EXACT COPY OF CALJIC 6.00 (FIFTH EDITION)
ATTEMPT – DEFINED

Supreme Court, U.S.
FILED
MAY 7 1991
OFFICE OF THE CLERK

No. 90-1355

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

THAKORBHAI L. PATEL,
Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL
FOR THE STATE OF CALIFORNIA,
FOURTH APPELLATE DISTRICT, DIVISION TWO

RESPONDENT'S BRIEF IN OPPOSITION

DANIEL E. LUNGREN, Attorney General of the State of California

GEORGE WILLIAMSON, Chief Assistant Attorney General - Criminal Division

HARLEY D. MAYFIELD, Senior Assistant Attorney General

ROBERT M. FOSTER
Supervising Deputy Attorney General

M. HOWARD WAYNE
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101
Telephone: (619) 237-7765

Attorneys for Respondent

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the First Amendment protects the conduct of an individual who orally advises a prostitute of an imminent arrests by an undercover officer, so that the prostitute may try to avoid arrest by fleeing from the police.

LIST OF PARTIES

Petitioner, Thakorbhai L. Patel, is on probation, and is at liberty from a commitment of 90 days in the San Bernardino County Jail pending appeal. The People of the State of California are represented by Attorney General Daniel E. Lungren.

OPINION BELOW

Petitioner seeks a writ of certiorari to review an unpublished opinion of the California Court of Appeal, Fourth Appellate District, Division Two. (*People of the State of California v. Thakorbhai L. Patel*, (Case E007180).) The opinion is attached to the petition as Appendix 1.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES i

OPINION BELOW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 3

Defense 10

SUMMARY OF REASONS WHY THE PETITION SHOULD BE DENIED 10

ARGUMENT 11

I. A STATUTE WHICH IS DESIGNED TO PREVENT ANYONE FROM OBSTRUCTING AN OFFICER FROM THE PERFORMANCE OF DUTY IS NOT DIRECTED AT FREE SPEECH AND NEED NOT BE A SPECIFIC INTENT CRIME 11

II. PETITIONER HAS FAILED TO ESTABLISH THAT BECAUSE OF THE ALLEGED ERROR IN INSTRUCTING THE JURY ON HIS OBSTRUCTION CHARGE HE WAS DENIED A FAIR TRIAL AS TO THE OTHER OFFENSES FOR WHICH HE WAS CONVICTED 24

CONCLUSION 27

TABLE OF AUTHORITIES

CASES	Page
Cohen v. *California*, 403 U.S. 15, L.Ed.2d 284, 91 S.Ct. 1789 (1971)	21
Gooding v. *Wilson*, 405 U.S. 518, 31 L.Ed.2d 408, 92 S.Ct. 1103 (1972)	22
Houston v. *Hill*, 482 U.S. 451, 96 L.Ed.2d 398, 107 S.Ct. 2502 (1987)	15-19
In re Gregory S., 112 Cal.App.3d 764, 169 Cal. Rptr. 540 (1980)	12
In re Joe R., 12 Cal.App.3d 80, 90 Cal. Rptr. 530 (1970)	12
People v. *Powell*, 99 Cal.App.2d 178, 221 P.2d 178 (1950)	12
People v. *Roberts*, 131 Cal.App.3d Supp. 1, 182 Cal.Rptr. 757 (1982)	13
Terminiello v. *Chicago*, 337 U.S. 1, 93 L.Ed. 1131, 69 S.Ct. 894 (1949)	23
Tinker v. *Des Moines Independent School District* 393 U.S. 503, 21 L.Ed.2d 731, 89 S.Ct. 733 (1969)	21
United States v. *Kelner* 534 F.2d 1020 (2nd Cir. 1976)	21
United States v. *Velasquez* 772 F.2d 1348 (7th Cir. 1985)	21
Watts v. *United States*, 394 U.S. 705, 22 L.Ed.2d 664, 89 S.Ct. 1399 (1969)	20

TABLE OF AUTHORITIES, CONT'D

CONSTITUTIONAL PROVISIONS	Page
First Amendment	11, 20, 21, 23, 24

STATUTES	
California Penal Code § 148	11-13, 15, 19, 20, 22, 24
Code of Ordinance, City of Houston, Texas § 34-11(a)	16

STATEMENT OF THE CASE

On May 16, 1989, the District Attorney of San Bernardino County filed an amended information in the consolidated proceeding of SCR 47384 and SCR 48604, which charged petitioner with violation of California Penal Code section 266i (pandering, count one), California Penal Code sections 664/266h (attempted pimping, count two), California Penal Code section 266h (pimping, count three), California Penal Code section 316 (maintaining a disorderly house, count four, a misdemeanor) and California Penal Code section 148 (obstructing an office in the discharge of the duties of that office, count five, a misdemeanor). (CT 207-209.) Petitioner pled not guilty. (CT 205.)

Jury trial began on May 16, 1989, and petitioner was found guilty as charged on all counts. (CT 205, 214-219, 290-294.)

On August 31, 1989, pronouncement of judgment was withheld and petitioner was granted supervised probation for three years on condition he serve 90 days in county jail, to be served on weekends. (CT 304-306.) Petitioner's motion to post bail pending appeal was granted. (CT 309.)

On September 11, 1990, the California Court of Appeal, Fourth Appellate District, Division Two, affirmed petitioner's conviction. On November 28, 1990, the California Supreme Court denied petitioner's petition for review. Two justices voted to grant review, although the record does not show whether they voted to hear the case on the ground raised by the petition to this Court. (Appendix 2 to Petition.)

STATEMENT OF FACTS

On February 10, 1988, Jo Ann Miller, a San Bernardino County Deputy Sheriff, was working undercover. She was posing as a prostitute as part of the investigation of the Palms Motel. The motel was located at 3424 Cajon Boulevard in San Bernardino County. (RT 155-156, 186.) At 2:45 in the afternoon she went to the motel office and asked petitioner, who was behind the desk, if he had any rooms which she could rent for a short time. Petitioner said the minimal rental was for an hour. Miller rented a room for an hour for $10. She was not given a key to the room, nor was she asked to sign a registration form. (RT 158-160, 186, Exh. 23, p. 1.) Miller went into the motel room with Deputy Sheriff William Sheble for 15 to 20 minutes, then left and returned to the Sheriff's station for a briefing. (RT 159, 238.)

At about 5 p.m. another deputy, Lawrence Mosley, rented a room from petitioner for the evening for $35. To rent the room he completed a registration card. (RT 222-223.) From the room Mosley observed male and female couples entering motel rooms without luggage, staying approximately 30 minutes and leaving. (RT 225.) About an hour after he rented the room petitioner came to the room and told Mosley that it was his policy not to allow the curtains in his motel rooms to be open. (RT 226.)

Miller returned to the motel at about 5:00 that evening with Deputy Joe Miller, who was dressed in civilian clothes and remained in his truck. She rented a room from another individual who was at the clerk's desk for $10. She stayed in the motel room fifteen to twenty minutes with the deputy, then left. (RT 161-164, 167, Exh. 23, p. 2.)

Miller later returned to the motel with two reserve deputies. She went to the office to rent a room and petitioner asked how many people she had. She responded two, and petitioner said that she was not allowed to have more than one person with her in the room at any time. When she said she would have more than one person there at a time, petitioner said she would have to pay $10 per person. (RT 169-170, Exh. 23, p. 3.) She went back to the car to get more money, then returned, paid $20, and had a room rented to her. She did not sign a registration card. (RT 170-171.) The male deputies went into the room with Miller in sequence. Fifteen minutes after the second deputy went into the room, he and Miller left together in the same vehicle. (RT 174.)

At about 7 p.m. Al Barnett, a reserve officer acting in an undercover

capacity, went to the Palms Motel and asked petitioner if Miller had been there. (RT 198-200, Exh. 24, pp. 1-4.)

Miller returned to the motel shortly after 7:00 with another deputy, also dressed in civilian clothes. Petitioner said someone had been asking for her. He asked Miller if she had asked someone to meet her there at a certain time. She said that she did. She asked petitioner to describe the person, Barnett, and then she said he was a "high dollar" person. (RT 175, Exh. 23, pp. 5-6.) During this conversation petitioner came over to Miller and, as he talked to her, touched her around her bare midriff. (RT 178.) Petitioner rented her a room for one hour for $10. Again, she neither signed a registration card nor received a key to the room. (RT 176.) Miller and the deputy went into the room. (RT 179.) While they were in the room a buzzer went

off. She went outside the motel and saw Barnett with petitioner. (RT 179-180.)

Barnett asked petitioner if he would have to pay for the room, and petitioner responded that he would. (RT 181-182.) Barnett paid petitioner $10, then went into the room with Miller. (RT 182-183, 209, 211.) When the undercover officers left the motel room they arrested petitioner. (RT 183.)

On April 20, 1988, San Bernardino Deputy Sheriff Sheble was driving a van on Mt. Vernon Avenue in San Bernardino. Officer Lawrence Mosley, was a passenger in the vehicle. Emma Henderson waived at the vehicle and, when it stopped, she got into the van. Henderson solicited Sheble and Mosley for sex, and they agreed on a price of $15 per person. Sheble asked if she had a place where she comfortable in going. Henderson said Sheble had a bedroom on wheels, and

Sheble responded he wanted to take a little more time. He asked if she had a motel, and Henderson directed them to the Palms Motel. (RT 131-135, 227-228, 244-245, 255-256, 262-263.) Henderson had previously rented rooms at the motel from petitioner for prostitution. She would be charged $8 to $12 to use a room for one to two hours. (RT 137-139.)

At the motel Sheble told Henderson he did not want to be seen by the people there and expressed concern about registering. He asked her how much money was needed to rent a room, then gave her a five dollar bill and seven one dollar bills. (RT 245.)

When Henderson returned she began to suspect Sheble was a police officer. She started to walk down the street and Sheble drove after her. Sheble demanded to know what had happened to his money. Henderson replied she did not have

it on her and accused Sheble of being a police officer. Sheble convinced her that he was not an officer. She entered the vehicle and they returned to the motel. Henderson lead Sheble to room number five. They did not have a key, but the door was open. (RT 246-247.)

As they were standing at the motel room door, petitioner stepped out of his office and saw Sheble. He began to yell that Sheble was an undercover police officer.[1/] Petitioner demanded identification from Sheble and yelled "you're undercover. You're undercover." Henderson fled. Mosley pursued her and placed her under arrest. Petitioner was

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1. Henderson testified that when she attempted to rent the room petitioner told her Sheble was an undercover officer. However, it is unclear that petitioner would have been able to see Sheble at that time since petitioner was in the motel office and Sheble was in the van. (RT 140.)

arrested shortly thereafter. (RT 140-143, 227-228, 231-232, 248.)

DEFENSE

- Petitioner rested without putting on any evidence. (RT 273.)

SUMMARY OF REASONS WHY THE PETITION SHOULD BE DENIED

The petition for writ of certiorari does not raise any issues that merit the exercise of this Court's discretionary jurisdiction. The decision of the Court of Appeal, Fourth Appellate District, was in full accord with the prior decisions of this Court, and the position advanced by petitioner borders on the frivolous.

ARGUMENT

I

A STATUTE WHICH IS DESIGNED TO PREVENT ANYONE FROM OBSTRUCTING AN OFFICER FROM THE PERFORMANCE OF DUTY IS NOT DIRECTED AT FREE SPEECH AND NEED NOT BE A SPECIFIC INTENT CRIME

In a two part argument, petitioner contends the trial court committed error by failing to instruct the jury that to find him guilty of obstructing an officer in the performance of duty, the jury would have to find that petitioner acted with that specific intent. He argues that absent such intent, petitioner engaged in a mere utterance which was protected by the First Amendment to the United States Constitution. (Pet., pp. 13-20.) Because California Penal Code section 148 is not directed at speech, the contention does not reach constitutional dimensions.

Petitioner was convicted of, *inter alia*, violating California Penal

Code section 148, a misdemeanor, which provided, in pertinent part, at the time of the offense:

> "Every person who willfully resists, delays or obstructs any public officer, [or] peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment . . . is punishable by a fine not exceeding one thousand dollars ($1,000) or by imprisonment in a county jail . . . ."

The crime may be committed by conduct such as flight to avoid arrest (*In re Gregory S.*, 112 Cal.App.3d 764, 780, 169 Cal. Rptr. 540, 548 (1980)), physically attacking an officer (*People* v. *Powell*, 99 Cal.App.2d 178; 221 P.2d 178 (1950)), and harassing an officer so that the officer is unable to elicit information (*In re Joe R.*, 12 Cal.App.3d 80, 86; 90 Cal. Rptr. 530, 533 (1970)).

California Penal Code section 148 is a general intent crime, and thus no instruction on the specific intent with

which the act is performed is required. (*People* v. *Roberts*, 131 Cal.App.3d Supp. 1, 8-9; 182 Cal. Rptr. 757, 760-761 (1982).)

The jury was instructed that to establish a violation of Penal Code section 148, the prosecution would have to prove that petitioner "willfully resisted, delayed, or obstructed a peace officer . . . engaged in the performance of his duties." (RT 298.) The jury was further told that "[a] peace officer is discharging or attempting to discharge . . . his duties if he is making or attempting to make a lawful arrest or lawfully detaining or attempting to detain a person for questioning or investigation." (RT 299.) Thus the jury was aware that to convict petitioner, it would need to find that petitioner's conduct (i.e. shouting "you're undercover. You're undercover") was committed for the

purpose of obstructing the officer from arresting or detaining the prostitute. In this regard the prosecutor argued to the jury:

> ". . . [Petitioner] knew that Miss Henderson, being a prostitute, would have been arrested . . . . And so, by throwing out a couple of words indicating that [Sheble] was a police officer, words that she would understand, he knew that he could mess up the operation . . . .
>
> . . .
>
> ". . . [T]hat is where we get the charge of obstructing a police officer during the course of his investigation . . . ." (RT 309-310.)

From the instructions the court gave, and from the argument of the prosecutor, the jury was informed that to find petitioner guilty it would need to determine that the purpose of his conduct was to obstruct the officer in the performance of his efforts to arrest or detain Miss Henderson. They could not convict him solely on the basis that he spoke a few words.

Petitioner argues that application of California Penal Code section 148 to his conduct violates this Court's holding in *Houston* v. *Hill*, 482 U.S. 451; 96 L.Ed.2d 398; 107 S.Ct. 2502 (1987). Because the statute here is not directed at speech, petitioner is incorrect.

In *Houston* v. *Hill*, Hill had observed a friend intentionally stopping traffic on a busy street, apparently to enable a vehicle to enter traffic. Two police officers approached the friend and began speaking with him. Shortly thereafter Hill began shouting at the officers, in an attempt to divert an officer's attention from the friend. Hill first shouted "'Why don't you pick on somebody you own size?'" When the officer asked if Hill was interrupting him in his official capacity, Hill shouted "'Yes, why don't you pick on somebody my size?'"

(*Houston* v. *Hill*, *supra*, 482 U.S. at pp. 453-454; 96 L.Ed.2d at p. 398: 107 S.Ct. at p. 2502.)

Hill was prosecuted and acquitted of violating an ordinance of the city of Houston which provided:

> "(a) It shall be unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest." (Code of Ordinance, City of Houston, Texas § 34-11(a), quoted at *Houston* v. *Hill*, *supra*, 451 U.S. at p. 455; 96 L.Ed.2d at p. 408; 107 S.Ct. at p. 2506.)

Following his acquittal, Hill brought suit to have the ordinance declared unconstitutional both on its face and as applied to him.

Because the provisions of the ordinance making it unlawful for any person to assault or strike a police officer were preempted by the Texas Penal Code, the only portion of the ordinance at

issue was that directed at speech. (*Houston* v. *Hill*, *supra*, 451 U.S. at p. 460; 96 L.Ed.2d at p. 411; 107 S.Ct. at pp. 2508-2509.) This Court concluded that the ordinance was overly broad in that it provided the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them. (*Houston* v. *Hill*, *supra*, 451 U.S. at pp. 465-467; 96 L.Ed.2d at pp. 414-415; 107 S.Ct. at p. 2512.)

In his concurring and dissenting opinion in Houston v Hill, Justice Powell stated:

> ". . . I question the implication of the Court's opinion that the First Amendment generally protects verbal 'challenge[s] directed at police officers,' [citation]. A 'challenge' often takes the form of opposition or interruption of performance of duty. In many situations, speech of this type directed at police officers will be functionally indistinguishable from conduct that the First Amendment clearly does not protect. For example, I have no doubt that a

> municipality constitutionally may punish an individual who chooses to stand near a police officer and persistently attempt to engage the officer in conversation while the officer is directing traffic at a busy intersection. Similarly, an individual, by contentious and abuse speech, could interrupt an officer's investigation of possible criminal conduct. A person observing an officer pursuing a person suspected of a felony could run beside him in a public street shouting at the officer. Similar tactics could interrupt a policeman lawfully attempting to interrogate persons believed to be witnesses to a crime." (*Houston* v. *Hill*, *supra*, 482 U.S. at p. 479, 96 L.Ed.2d. at pp. 423-424; 107 S.Ct.at p. 2519, footnote omitted.)

In response, the majority opinion stated that the concern in Justice Powell's example was not contentious speech, but rather that the shouting and running in the hypothetical might physically obstruct the officer's investigation. The majority opinion stated that such conduct might constitutionally be punished under a

tailored statute that forbade individuals from physically obstructing an officer in the performance of duty, rather than under a broad statute aimed at speech. (*Houston v. Hill, supra*, 451 U.S. at p. 463, 96 L.Ed.2d at p. 412; 107 S.Ct. at p. 2510, n. 11.)

California Penal Code section 148 is a statute directed an forbidding individuals from physically obstructing an officer in the performance of official duties. Just as in the hypothetical set forth in Justice Powell's opinion, petitioner, by advising Henderson that Sheble was a law enforcement officer, was attempting to obstruct the officer from the performance of official duties, here by affording Henderson an opportunity to flee from arrest.[2/] Petitioner was not

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2. Petitioner urges that no duty was being discharged because Henderson was already in constructive police custody. (Pet., p. 14.) The Court of Appeal found the distinction petitioner

engaging in free speech, but instead, conduct designed to frustrate the officer in the performance of his duties.

Section 148 is not a statute aimed at speech. The reported decisions involving it deal almost exclusively with conduct. The particular conduct here was conduct (i.e. obstructing an arrest or investigation) manifested as words. The First Amendment does not immunize conduct because the conduct is manifested in words. (*Watts* v. *United States*, 394 U.S. 705, 707; 22 L.Ed.2d 664; 89 S.Ct. 1399,

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asserts unavailing:

> ". . . Without voicing our opinion whether the prostitute was indeed in constructive custody at the time of Patel's interference, we need only say that even if she was, this fact is irrelevant . . . . Obviously, [the officers'] overriding purpose was to investigate activities at Patel's motel and that operation was ongoing until Patel caused is premature termination." (Pet., Appendix 1, p. 14.)

1401 (1969) [statute prohibiting threats against the President is constitutional on its face]; *United States* v. *Velasquez*, 772 F.2d 1348, 1357 (7th Cir. 1985), *cert. denied* 475 U.S. 1021; 89 L.Ed.2d 323; 106 S.Ct. 1211 [threat to retaliate against informant is not protected by the First Amendment]; *United States* v. *Kelner*, 534 F.2d 1020, 1025-1027 (2nd Cir. 1976), *cert. denied* 429 U.S. 1022; 50 L.Ed.2d 623; 97 S.Ct. 639 [threat to injure another is not protected by First Amendment].)

Petitioner's action was not speech manifested as conduct (e.g., *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503; 21 L.Ed.2d 731; 89 S.Ct. 733 (1969) [arm bands worn by high school students protesting the Vietnam war]; *Cohen* v. *California*, 403 U.S. 15; 29 L.Ed.2d 284; 91 S.Ct. 1789 (1971) [wearing a jacket in a courthouse that said 'Fuck

the draft"]), but conduct manifested as words. Conceptually it was no different than tackling the officer so he could not pursue Henderson, or driving a getaway car for the suspect. Such conduct would not be protected, and does not obtain constitutional protection by being manifested in words.

Consequently, California Penal Code section 148 differs from the ordinance invalidated in *Houston* v. *Hill* and is constitutionally sound as written.

Moreover, the evil addressed in *Houston* v. *Hill* was that the ordinance was an effort to criminalize speech directed at the officer. (fn. 11, *supra*; *Gooding* v. *Wilson*, 405 U.S. 518; 31 L.Ed.2d 408; 92 S.Ct. 1103 (1972) [statute which made it a crime for anyone to direct to another, in his presence, "opprobrious words or abusive language tending to cause a breach of the peace" found to be

overbroad in context of shouting at a police officer while picketing against the war in Vietnam].) The speech here was not directed at the officer, but at the suspect.

The balance of cases cited by petitioner concern protection of speech, rather than protection of conduct manifested as words. For example, *Terminiello* v. *Chicago*, 337 U.S. 1; 93 L.Ed. 1131; 69 S.Ct. 894 (1949), involved the suppression of controversial views under the rubric of a "breach of the peace" statute. In contrast, the entire thrust of the statute and the prosecution here was petitioner's conduct in obstructing an officer by warning a suspect that police were present.

Petitioner fails to raise any valid First Amendment issue and his petition should be denied.

II

PETITIONER HAS FAILED TO ESTABLISH THAT BECAUSE OF THE ALLEGED ERROR IN INSTRUCTING THE JURY ON HIS OBSTRUCTION CHARGE HE WAS DENIED A FAIR TRIAL AS TO THE OTHER OFFENSES FOR WHICH HE WAS CONVICTED

Petitioner also contends that the failure to give the instruction discussed in Argument I for the misdemeanor offense of obstructing an officer infected his convictions for three felonies and another misdemeanor. (Pet., p. 21.) Not only has petitioner failed to substantiate this claim, but he has failed to raise a constitutional issue.

Petitioner's basic position is that Penal Code section 148, as applied here, violated his rights under the First Amendment to the Constitution. He does not even claim that his conduct of pandering, pimping, attempted pimping and maintaining a disorderly house is similarly protected.

What he does instead assert is that "[a]ll verdicts were infected by what must have been confused and easily awry jury instructions" inasmuch as different definitions of intent were given for different crimes. (Pet., p. 21, emphasis added.) In fact the jury was properly instructed, since pandering and attempted pimping are specific intent crimes, and the jury was instructed on the required specific intent (RT 295, 297), while pimping and maintaining a disorderly house are general intent crimes and the jury was properly instructed on that element. (RT 294.) These are not confusing and "easily awry" instructions, these are the law. Moreover, the jury was told that each count charged a distinct crime which must be decided separately. (RT 301.)

The speculation that the jury was confused is unsubstantiated, and the

claim, in any event, does not raise a constitutional issue.

Petitioner's attempt to piggyback reversal of his four other convictions on his claim of denial of freedom of speech for a misdemeanor conviction should be recognized for what it is and dismissed.

CONCLUSION

For all of the reasons stated above, petitioner has failed to establish the existence of any issue which merits the grant of certiorari. The decision of the Court of Appeal was in accord with the Constitution and established precedent. Accordingly, the petition should be denied.

DATED: May 7, 1991

Respectfully submitted,

DANIEL E. LUNGREN, Attorney General
of the State of California

GEORGE WILLIAMSON, Chief Assistant
Attorney General - Criminal Division

HARLEY D. MAYFIELD, Senior Assistant
Attorney General

ROBERT M. FOSTER
Supervising Deputy Attorney General

M. Howard Wayne

M. HOWARD WAYNE
Deputy Attorney General

Attorneys for Respondent

MHW:lv

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

DANIEL E. LUNGREN
Attorney General of
the State of California

M. HOWARD WAYNE
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101

No: 90-1355
October Term, 1990

THAKORBHAI L. PATEL,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have caused service of the within RESPONDENT'S BRIEF IN OPPOSITION as follows:

To Joseph F. Spaniol, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named below as follows: each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 7th day of May, 1991.

Dennis Tilton
Attorney at Law
234 N. Arrowhead Avenue
San Bernardino, California 92408

Stephen M. Kelly, Clerk
California Court of Appeal
Fourth Appellate District
Division Two
303 West Fifth Street
San Bernardino, California 92401

There is a delivery service by United States Mail and/or courier service at each place so addressed or regular communication by United States Mail and/or courier service between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, May 7, 1991.

Lidia Villarreal
LIDIA VILLARREAL

Subscribed and sworn to before me this 7 day of May, 1991.

REGINA C. KAMHOLZ
Notary Public—California
County of San Diego
My Commission Expires 11/19/91

Regina C. Kamholz
Notary Public in and for said County and State